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IN THE

SUPREME COURT OF THE UNITED STATES

SUPREME COURT, U.S.
FILED
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JOHN F. DAVIS, CLERK

OCTOBER TERM 1966

No. 675

LAIRD & COMPANY, a Corporation; AFFILIATED DISTILLERS BRAND CORP., a Corporation; BROWN-FOREMAN DISTILLERS CORP., a Corporation; CANADA DRY CORPORATION, a Corporation; GLENMORE DISTILLERIES COMPANY, a Corporation; GOODERHAM & WORTS, LIMITED, a Corporation; HIRAM WALKER INCORPORATED, a Corporation; HUEBLEIN, INC., a Corporation; JAMES B. BEAM DISTILLING CO., INC., a Corporation; JAS. BARCLAY & CO., LIMITED, a Corporation; MR. BOSTON DISTILLER, INC., a Corporation; NATIONAL DISTILLERS AND CHEMICAL CORPORATION, a Corporation; STITZEL-WELLER DISTILLERY, INC., a Corporation; THE AMERICAN DISTILLING COMPANY, a Corporation; THE FLEISCHMANN DISTILLING CORP., a Corporation; THE HOUSE OF SEAGRAM, INC., a Corporation; W. A. TAYLOR & COMPANY, a Corporation; HIRAM WALKER-G. & W. INC., a Corporation; BARTON DISTILLING COMPANY, a Corporation; BACARDI IMPORTS, INC., a Corporation; MOGEN DAVID WINE CORPORATION, a Corporation; PUBLICKER DISTILLER PRODUCTS, INC., a Corporation; RENFIELD IMPORTERS, LTD., a Corporation; SCHIEFFELIN & CO., a Corporation; FROMM & SICHEL, INC., a Corporation; PAUL MASSON, INC., a Corporation; STAR HILL DISTRIBUTING CO., a Corporation; McCORMICK DISTILLING CO., a Corporation; E. J. GALLO WINERY, a Corporation; McKESSON & ROBBINS, INCORPORATED, a Corporation; TWENTY-ONE BRANDS, INC., a Corporation; MEDAL DISTILLED PRODUCTS, INC., a Corporation,
Appellants,

vs.

J. R. CHENEY, Director of Alcoholic Beverage Control; EVERETT STEERMAN, ROBERT F. GALLOWAY and ALFRED WILLIAMS, Members of the Alcoholic Beverage Control Board of Review; ROBERT C. LONDERHOLM, Attorney General of the State of Kansas,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

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J. R. CHENEY, Director of Alcoholic Beverage Control; EVERETT STEERMAN, ROBERT F. GALLOWAY and ALFRED WILLIAMS, Members of the Alcoholic Beverage Control Board of Review; ROBERT C. LONDERHOLM, Attorney General of the State of Kansas,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

Appellees move to dismiss this appeal on the ground that it does not present any substantial federal question.

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STATEMENT OF THE CASE

The 1961 Session of the Kansas Legislature enacted a statute relating to the pricing of alcoholic liquor in the State of Kansas at the manufacturer, distributor and retailer levels. The same now appears as K.S.A. 41-1111 to 41-1121, inclusive (Jurisdictional Statement, Appendix D). This statute in substance provides that when manufacturers of alcoholic liquor post the prices at which they will sell alcoholic liquor to Kansas distributors, as required by K.S.A. 41-1101 (Jurisdictional Statement, Appendix E), the manufacturers shall post at prices which are no higher than the lowest price at which the same liquor is sold to any distributor within the United States. It further provides that the Alcoholic Beverage Control Board of Review (hereinafter referred to as the Board) shall determine the minimum sale prices for alcoholic liquor sold by distributors and retailers in Kansas under the conditions and standards set by the statute.

The minimum sales price to be fixed for sales by distributors and retailers is to be established by the Board, taking into consideration the following factors, as set forth in Section 6 of the statute (K.S.A. 41-1116): (a) The acquisition costs to be licensed distributors and retailers; (b) federal, state, and local taxes and license fees paid by distributors and retailers which are levied or imposed in connection with their business of distributing or selling alcoholic liquor in this state; (c) selling costs of licensed distributors and retailers; (d) cost of transportation to distributors from the F.O.B. shipping point to a base point in the State of Kansas; and delivery charges in connection with the shipment of alcoholic liquor; (e) any legitimate, reasonable expense not hereinbefore specified, incurred

in the legal conduct of their businesses as licensed distributors and retailers; and, (f) a reasonable markup or profit for the licensed distributors and retailers.

Pursuant to this statute, the Director of Alcoholic Beverage Control (hereinafter referred to as the Director) issued Memorandum No. 61-48 on May 19, 1961, to implement this statute in the price postings for the three-month period commencing August 1, 1961. This memorandum appears in Volume II of the Record as Plaintiffs' Exhibit No. 10 and as Appendix F, page A41, in the Appellants' Jurisdictional Statement.

On June 14, 1961, 18 manufacturers of alcoholic liquor (appellants herein) filed a joint petition for declaratory judgment and injunctive relief against the enforcement of K.S.A. 41-1112 (Section 2 of the statute) and the remaining portions of the act. On that same day, these plaintiffs obtained a temporary restraining order against the enforcement of the act. Attached to the motion for temporary restraining order were affidavits of corporate officers of appellants Laird, Brown-Foreman, Glenmore, National Distillers Products, Stitzel-Weller, Seagram, and Fleischmann. The original restraining order was subsequently modified, and in May and June 1963, 17 additional manufacturers or suppliers became parties plaintiff.

The matter was tried by the District Court of Shawnee County, Kansas, on December 9, 10 and 11, 1963, at which time evidence was introduced by appellants consisting of depositions of officers of appellants Brown-Foreman (R. 146), Stitzel-Weller (R. 147), Glenmore (R. 147), National Distillers Products (R. 148), and Seagram (R. 150), and the deposition of a marketing consultant to the liquor industry (R. 144). Total narrative of the testimony is contained in the Alternative Narrative Statement contained in the Record at pages 151 through 330. The evidence

introduced on behalf of the defendants consisted of the affidavits of 42 manufacturers and suppliers of alcoholic liquor which had been filed with the office of Alcoholic Beverage Control of the State of Kansas, pursuant to and in compliance with K.S.A. 41-1112 (R. 151, Exhibits D1 through D42). The trial court made findings of fact and conclusions of law and in general found the statute to be unconstitutional under various state and federal constitutional provisions.

The appellees perfected an appeal to the Kansas Supreme Court which reversed the district court on all questions and held the statute to be constitutional. The opinion of the Kansas Supreme Court appears in the appellants' Jurisdictional Statement as Appendix A, commencing at page A1. Following the denial of rehearing, the appellants have taken this appeal, raising the federal questions previously outlined. Three of the corporate plaintiffs did not appeal.

ARGUMENT

The statute involved in this case is similar, although not identical, to that statute which this Court reviewed in *Joseph E. Seagram and Sons, Inc.* v. *Hostetter*, 384 U.S. 35 (1966). The various questions raised by the appellants here are in the main answered in that case quite convincingly and totally adversely to the position of the appellants.

The appellants contend that the case at bar is within an area left undecided by this Court in the Seagram case. However, the appellants misconstrue the status of the two cases. The appellants' position is that the Kansas statute is not merely being adjudicated on its face but as construed and applied. The statute here in question has never, during

the litigation of this question in the state courts, been applied to the appellants, and subsequent regulations under and applications of the statute are not before this Court. The appellants made their own construction of the statute and attempted to litigate the case on the basis of that construction. The district court agreed with them, but the Kansas Supreme Court disagreed and construed the statute. The appellants' construction and testimony concerning the ramifications of this statute are similar in this case to those reviewed by this Court in *Joseph E. Seagram and Sons, Inc.* v. *Hostetter,* supra. There is no testimony in the record in this case which was taken after either the New York law or the Kansas law was enforced against any appellant. Accordingly, the interstate commerce ramifications which the appellants urge as a basis for holding this statute unconstitutional are no more fully explored in this case than they were in the Seagram case. Moreover, the liquor on which the appellants must file price lists is liquor destined for distribution and use solely within the State of Kansas. In this manner, the case at bar is identical to the Seagram case. Kansas has not attempted to tell the appellants what price they may charge in any other state, but only what price they may charge on liquor which would be sold to Kansas distributors for distribution, use and consumption in the State of Kansas.

The one area that is perhaps not determined by *Joseph E. Seagram and Sons, Inc.* v. *Hostetter,* supra, is the vague and indefinite argument which the appellants make. However, this vagueness is really settled and all questions of construction are resolved by the opinion of the Supreme Court of Kansas. Whatever doubt appellants may have had as to what is contemplated by the statute can no longer exist; hence, the statute is not void for vagueness. *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963). Additionally, it should be pointed out that while these 32

appellants have never attempted to comply with this statute prior to the opinion of the Kansas Supreme Court, evidence was introduced to show that 42 suppliers of alcoholic liquor were in fact filing the required affidavits and were apparently able to make the determinations necessary for such affirmations. The appellants disagree with the construction placed on the statute by the Kansas Supreme Court; however, this is purely a matter of state law and binding upon this Court. *Huddleston* v. *Dwyer,* 322 U.S. 232 (1944); *Guaranty Trust Co.* v. *York,* 326 U.S. 99 (1945). As to the criminal penalties, these generally relate to a sale below minimum price by a distributor or retailer as prohibited by K.S.A. 41-1117. The sanction imposed against a supplier who fails to affirm that the price filed is as low as the lowest or who files a price above the proper one would be the termination of the supplier as an authorized source of liquor for Kansas licensed distributors.

The appellants contend that this statute deprives them of property by reducing the amount of profit which they may obtain from the sale of a case of alcoholic liquor to a Kansas distributor. That this reduction in price, if any, given to Kansas distributors does not give that distributor a windfall can be seen from two facts. First, most of the reduction would be based on rebates or other reductions of the invoice price given to distributors in other states but not given to the Kansas distributor because of the restrictions of Kansas law. Second, the price reduction is passed on to the retailer and consumer under the provisions of K.S.A. 41-1115 and 41-1116. Therefore, rather than discriminating in favor of the Kansas distributor, this puts him on an equal footing with that distributor in other states. That there is nothing basically unconstitutional about a maximum price law was reaffirmed by this Court in *Joseph E. Seagram and Sons, Inc.* v. *Hostetter,* supra.

The appellants further contend that this is an arbitrary exercise of power outside of the scope of the police power since the purpose is in part to foster temperance and this particular section of the statute, in the view of the appellants, does not promote temperance. However, Section 2 (now K.S.A. 41-1112) is only a portion of a comprehensive statute regulating prices at all three levels—manufacturer, distributor, retailer. It is quite a strained construction to face each section of a comprehensive statute with each of the announced bases and strike that section if it does not implement all bases. The fact that a statute may be mischievous from the point of view of some state policy is not a basis for declaring it to be unconstitutional. *Osborn* v. *Ozlin*, 310 U.S. 53 (1940).

The appellants have made absolutely no showing that the Kansas statute does in fact violate any constitutional provision or guarantee. They have not shown that the statute as construed and applied (for it has been applied to most of them since September 1, 1966) in this litigation is other than similar to the statute of the State of New York upheld by this Court in *Joseph E. Seagram and Sons, Inc.* v. *Hostetter*, supra. Their forum is, as the Kansas Supreme Court pointed out, the legislature, and not the courts. *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963). Their vagueness argument depends on a construction different from that made by the Kansas Supreme Court, the final arbiter of the construction of the Kansas statute. That the Kansas Supreme Court chose to disregard or overrule findings of the trial court offers no solace to the appellants, for such is not a question of federal law, but is one of state law.

CONCLUSION

There being no substantial federal question raised in this appeal when the questions are viewed in the light of previous decisions of this Court and when the case is viewed on the record, this appeal should be dismissed. *Palmer Oil Corp.* v. *Amerada Petroleum Corp.*, 343 U.S. 390 (1952).

Respectfully submitted,

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